

SPORTS MEDICINE: DOPING, DISABILITY & HEALTH QUALITY

FOREWORD*

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The delivery of healthcare to athletes is an increasingly complex topic involving ethicists, lawyers, and regulators in both national and international arenas. This conference on sports medicine concentrated on three controversial medico-legal issues: drug and supplement use by athletes, accommodations to disabled athletes, and the healthcare effects of the complex relationships among sports teams, their doctors, and their athletes. On March 17, 2005, the day before the conference, Congress held its now-infamous hearings on the use of performance-enhancing drugs in Major League Baseball.¹ The images from those hearings, particularly the absolute denial of steroid use by Rafael Palmeiro² and the progressively more insistent claim by former St. Louis Cardinals batsman Mark McGwire that he was “not here to talk about the past,”³ dominated the headlines for weeks thereafter.⁴

The doping issue and its potentially disastrous impact on the integrity and, eventually, the popularity of sport continue to make headlines. In the months following our conference, Congress examined drug use in the National

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1. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005), available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=20323.pdf&directory=/diskb/wais/data/109_house_hearings.

2. *Id.* at 227 (testimony of Rafael Palmeiro).

3. *Id.* at 242 (testimony of Mark McGwire); see also *McGwire Mum on Steroids in Hearing*, CNN.COM, Mar. 17, 2005, <http://www.cnn.com/2005/ALLPOLITICS/03/17/steroids.baseball/>.

4. See generally Lori Shontz, *McGwire's Place in History: Still a Hero? Mark McGwire Makes His First Trip Back to Busch Stadium Since His Painful Testimony Concerning Steroid Use. He Will Find Out Whether His Legacy Has Been Tarnished*, ST. LOUIS POST-DISPATCH, Sept. 29, 2005, at A1.

Basketball Association,⁵ and Rafael Palmeiro, one of the testifying baseball players, was suspended by Major League Baseball, prompting the House Committee on Government Reform to investigate the truthfulness of the player's past testimony.⁶ As the national pastime gave over its television slots for the winter's NFL season, we were faced with the usual slew of press reports hinting at the suspension of NFL football players for violating the league's substance abuse policy.⁷ Meanwhile, several prominent players apparently have fallen afoul of the anti-doping rules used in professional tennis.⁸ The men's professional tennis tour (the ATP) has faced criticism as to its objectivity in dealing with performance-enhancing drugs,⁹ and has announced that the International Tennis Federation will take over control of its anti-doping efforts.¹⁰ Finally, the celebrations surrounding Lance Armstrong's extraordinary record seventh victory in the Tour de France and his subsequent retirement were inevitably tainted by the reemergence of rumors concerning previously undetectable blood doping from earlier in his career.¹¹

Recently, the Commissioner of Major League Baseball placed pressure on the league's union to accept stiffer penalties when he publicly endorsed a new steroids policy.¹² Ultimately, on November 15, 2005, the players' union

5. *Examining the National Basketball Association's Steroid Testing Program: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005), available at <http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=27415>.

6. *House Panel Wants Palmeiro Drug Test*, FOX NEWS.COM, Aug. 4, 2005, <http://www.foxnews.com/story/0,2933,164664,00.html>. Eventually, Congress determined that there was not enough evidence to pursue a perjury charge against Palmeiro. Associated Press, *Palmeiro Will Not Be Prosecuted: Lawmakers: Not Enough Evidence for Perjury Charges*, SPORTS ILLUSTRATED.COM, Nov. 10, 2005, <http://sportsillustrated.cnn.com/2005/baseball/mlb/11/10/palmeiro.ap/index.html>.

7. See, e.g., *Titans' Henry Suspended for Violating Substance Abuse Policy*, YAHOO SPORTS.COM, Sept. 26, 2005, <http://sports.yahoo.com/nfl/news?slug=titanshenrysuspend&prov=st&type=lgs>; *Lions' Rogers Suspended for Substance Abuse*, ABC NEWS.COM, Oct. 6, 2005, <http://abcnews.go.com/Sports/wireStory?id=1188909>.

8. *American Player Handed Drugs Ban*, BBC NEWS.CO.UK, Sept. 27, 2005, <http://news.bbc.co.uk/sport1/hi/tennis/4286420.stm>; *Puerta Denies Taking Banned Drugs*, BBC NEWS.CO.UK, Oct. 5, 2005, <http://news.bbc.co.uk/sport2/hi/tennis/4311058.stm>; *Guillermo Cañas*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Guillermo_Cañas](http://en.wikipedia.org/wiki/Guillermo_Ca%C3%B1as) (last visited Nov. 22, 2005).

9. New Zealand Drug Agency, News, <http://www.nzdsa.co.nz/news.php?type=archive&nid=235> (last visited Nov. 22, 2003).

10. *Tennis Drug Testing to Be Unified*, BBC NEWS.CO.UK, Oct. 4, 2005, <http://news.bbc.co.uk/sport1/hi/tennis/4307928.stm>.

11. See Jim Vertuno, *Lance Armstrong Contemplating Comeback*, SFGATE.COM, Sept. 6, 2005, <http://sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/09/06/sports/s123117D13.DTL>; *Armstrong Not Facing Any Action*, BBC NEWS.CO.UK, Sept. 9, 2005, http://news.bbc.co.uk/sport1/hi/other_sports/cycling/4229804.stm.

12. Associated Press, *Bud Speaks: Selig: Yes on Steroid Legislation, No on Instant Replay*, SPORTS ILLUSTRATED.COM, Nov. 9, 2005, <http://sportsillustrated.cnn.com/2005/baseball/mlb/11/09/bc.bbo.gmmeetings.ap/index.html>.

agreed to amend its collective bargaining agreement to include a fifty-game suspension for first-time offenders, with a lifetime ban from the game after a third violation.¹³

Doping has not been the only health-related issue to migrate from the sports section to page-one headlines. There are all-too-frequent reports of the deaths of our young athletes, such as Arizona women's basketball center Shawntinice Polk who died of an apparent pulmonary blood clot,¹⁴ San Francisco 49ers offensive lineman Thomas Herrion who collapsed and died of an undetected heart ailment,¹⁵ and University of Missouri linebacker Aaron O'Neal who collapsed and died apparently because of viral meningitis.¹⁶ In this last case a wrongful death claim has been filed questioning the care O'Neal received following his collapse.¹⁷

Our keynote speaker, Richard Pound QC, the Chairman of the World Anti-Doping Agency (WADA), reminds us that "[t]he original anti-doping rules were adopted out of health and safety concerns, but they have evolved into a desire to protect the ethical platform underlying sport, the inherent humanistic values of sport, as well as to protect the health of the athletes."¹⁸ His piece explores the moral underpinnings of anti-doping regulation, explains its strict liability standards, and defends its reach beyond athletes to doctors and coaches. While Pound sees anti-doping in ethical terms and, predominantly, as a matter for sports authorities, Maxwell Mehlman undertakes a more critical analysis of the rationales for anti-doping regulation in both private and public arenas and examines the complex issue of what he terms "aesthetic regulation."¹⁹ Sri Melethil, a pharmacist and lawyer, questions the scientific justification for some inclusions on WADA's "prohibited list" and examines whether the list itself is overly inclusive.²⁰ Finally Dionne Koller analyzes the

13. Jack Curry, *Baseball Backs Stiffer Penalties for Drug Use*, N.Y. TIMES, Nov. 15, 2005, at A1.

14. Associated Press, *Arizona Player Collapses, Dies at 22 from Blood Clot*, ESPN.COM, Sept. 27, 2005, <http://sports.espn.go.com/ncw/news/story?id=2172894>.

15. Ian O'Connor, *Herrion Tragedy Hurts on Many Different Levels*, FOX SPORTS.COM, <http://msn.foxsports.com/nfl/story/4796964>.

16. Associated Press, *Attorney: Missouri Football Player Who Collapsed After Workout Died from Meningitis*, Aug. 23, 2005, CSTV.COM, <http://www.collegesports.com/sports/m-footbl/stories/082305aau.html>.

17. Alan Scher Zagier, *Staffers Failed to Help O'Neal, Teammates Say: Players Questioned Response of Trainers*, SHOW ME NEWS.COM, Aug. 27, 2005, <http://www.showmenews.com/2005/Aug/20050827News018.asp>.

18. Richard W. Pound, *Sports Medicine: Doping, Disability, and Health Quality: Keynote Address*, 50 ST. LOUIS U. L.J. 7, 9 (2005).

19. Maxwell J. Mehlman et al., *Doping in Sports and the Use of State Power*, 50 ST. LOUIS U. L.J. 15 (2005).

20. Srikumaran Melethil, *Making the WADA Prohibited List: Show Me the Data*, 50 ST. LOUIS U. L.J. 75 (2005).

legal nature of the leading sports regulatory bodies, particularly the United States Anti-Doping Agency, and their role as “state actors.”²¹

The second panel at the conference discussed the legal rights of athletes with pre-existing disabilities: in a sense, the mirror image of the “fair playing field” rationale argued by Mr. Pound and critiqued by Professor Mehlman. Here, Maureen Weston presents an insightful analysis of the extent to which federal disability laws require these athletes to be provided with a “reasonable accommodation.”²²

Finally, the conference participants examined the quality of healthcare provided to our athletes. Barry Furrow examines the standard of care owed by team doctors in the increasingly high-profile commercial world of professional sports.²³ Steven Calandrillo builds on Furrow’s ethical and legal analysis of the team doctor’s potential conflicts of interest and examines the impact of such physician–patient relationships being entered into by doctors for primarily marketing reasons.²⁴ Matthew Mitten critically considers the deleterious effects of applying the co-employee doctrine found in state workers’ compensation laws to immunize team physicians from malpractice liability.²⁵ Furrow (practice guidelines), Calandrillo (independent physicians or contractual guarantees), and Mitten (more astute collective bargaining) suggest specific approaches to minimizing the conflicts of interest that otherwise can impede high-quality healthcare provided to athletes.

Our conference faculty was without peer, featuring the leading regulators, practitioners, and academics in sports medicine. In addition to the authors mentioned above, the conference benefited from the wisdom of Travis T. Tygart (Senior Managing Director and General Counsel, United States Anti-Doping Agency), Darrow K. Soll (Quarles & Brady LLP), C. Peter Goplerud (Florida Coastal School of Law), John Collins (Collins & Collins), Robert H. Lattinville (Stinson Morrison Hecker, LLP), and Nicole B. Porter (Saint Louis University School of Law). We also received valuable input from a fascinating lunchtime panel consisting of Ray Barile (Athletic Trainer, St. Louis Blues), Jerry Jasiek (Senior Vice President of Finance and Hockey Administration, St. Louis Blues), Cheryl L. Levick (Athletics Director, Saint Louis University),

21. Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS U. L.J. 91 (2005).

22. Maureen A. Weston, *The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities*, 50 ST. LOUIS U. L.J. 137 (2005).

23. Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (Or Is It Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 185 (2005).

24. Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete–Patients*, 50 ST. LOUIS U. L.J. 185 (2005).

25. Mathew J. Mitten, *Team Physicians as Co-employees: A Prescription That Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 ST. LOUIS U. L.J. 211 (2005).

Michael J. Milne, MD, Jonathan D. Moberly (Executive V.P., Crown Sports & Entertainment Management, LLC), Peter H. Ruger (Tueth, Keeney, Cooper, Mohan & Jackstadt), and Michael Sorber (Assistant Soccer Coach, Saint Louis University and 1994 U.S. World Cup Team).

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In Memoriam

Darrow K. Soll, a good friend and great lawyer

